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INVESTIGATION OF THE INSLAW CASE

HEARING

BEFORE THE

PERMANENT
SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

AUGUST 11, 1988

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INVESTIGATION OF THE INSLAW CASE

THURSDAY, AUGUST 11, 1988

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:15 p.m., in room, SD-342, Dirksen Senate Office Building, Hon. Sam Nunn, Chairman of the Subcommittee, presiding.

Present: Senators Nunn, Levin, Roth, Cohen, and Rudman.

Staff Present: Eleanore J. Hill, chief counsel and staff director; John F. Sopka, deputy chief counsel; Alan Edelman, counsel; David B. Buckley, investigator; Harriet McFaul, counsel; Richard Dill, investigator; Harold Lippman, investigator; Kathleen Dias, executive assistant to chief counsel; Cynthia Comstock, staff assistant; Declan Cashman, secretary; Karla Williams, secretary; Daniel F. Rinzel, chief counsel to the minority; Barbara Kammerman, deputy chief counsel to the minority; Stephen Levin, counsel to the minority; Carla Martin, assistant chief clerk to the minority; Stephen M. Ryan (Senator Glenn); Robert Harris (Senator Glenn); Jack Mitchell (Senator Levin); Anita Jensen (Senator Mitchell); Alfred Salas (Senator Stevens); Kim Corthell (Senator Cohen); Marianne McGettigan (Senator Rudman); Sharon Soderstrom (Senator Trible); and Michael Davidson, Senate legal counsel.

[Letter of authority follows:]

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Washington, DC.

Pursuant to Rule 5 of the Rules of Procedure of the Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, permission is hereby granted for the Chairman, or any Member of the Subcommittee as designated by the Chairman, to conduct open and/or executive session hearings without a quorum of two members for the administration of oaths and the taking of testimony in connection with hearings on the Department of Justice Raised Objections to the Taking of Depositions of Departmental Employees by the Subcommittee, on August 11, 1988.

SAM NUNN,
Chairman.
WILLIAM V. ROTH, Jr.,
Ranking Minority Member.

Senator NUNN. The Subcommittee will come to order.

I would like to call our witnesses today; Mr. Thomas J. Stanton, who is the Director and Counsel of the Executive Office for United States Trustees, Department of Justice; and Mr. Robert Huneycutt,

Staff Assistant, Administrative Services, Executive Office of the United States Trustees, Department of Justice.

We swear all the witnesses in before our Subcommittee, so I will ask both witnesses to please stand and I will give you the oath.

Do you swear that the testimony you give before this Subcommittee will be the truth, the whole truth and nothing but the truth so help you God?

[Both answered in the affirmative.]

Senator NUNN. Thank you. I would like both of you, starting with you, Mr. Stanton, to please identify yourself for the record.

Mr. Huneycutt, you can take a seat up here.

TESTIMONY OF THOMAS J. STANTON, DIRECTOR AND COUNSEL, EXECUTIVE OFFICE FOR U.S. TRUSTEES, DEPARTMENT OF JUSTICE, AND ROBERT HUNEYCUTT, STAFF ASSISTANT, ADMINISTRATIVE SERVICES, EXECUTIVE OFFICE FOR U.S. TRUSTEES, DEPARTMENT OF JUSTICE, ACCOMPANIED BY JOHN R. BOLTON, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE, AND SANDRA P. SPOONER, ATTORNEY, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. STANTON. My name is Thomas J. Stanton. I am Director and Counsel of the Executive Office of United States Trustees in the Department of Justice.

Senator NUNN. Mr. Stanton, are you represented by counsel today?

Mr. STANTON. Yes. My attorney from the Department of Justice is here with me.

Senator NUNN. Would you introduce your counsel, please.

Mr. STANTON. Yes. Her name is Sandra Spooner, Civil Division.

Senator NUNN. Ms. Spooner, could you give us your title, please.

Ms. SPOONER. Senator, my name is Sandra P. Spooner. I am Deputy Director of the Commercial Litigation Branch of the Civil Division, Department of Justice.

Senator NUNN. Thank you. Mr. Stanton, did you request counsel?

Mr. STANTON. Yes, I did, Senator. I sent a letter to the Civil Division about a week ago in which I requested counsel be provided me by the Civil Division.

Senator NUNN. Thank you, sir.

Mr. Huneycutt, are you represented by counsel today?

Mr. HUNEYCUTT. Yes, sir. My counsel is the same as Mr. Stanton's.

Senator NUNN. Did you request counsel?

Mr. HUNEYCUTT. No, sir, I did not.

Senator NUNN. How did you come about having counsel?

Mr. HUNEYCUTT. I was informed by our general counsel in the Executive Office that Ms. Spooner would be representing both myself and Mr. Stanton.

Senator NUNN. So you were informed of that?

Mr. HUNEYCUTT. Yes, sir.

Senator NUNN. Did you object to that?

Mr. HUNEYCUTT. No, sir.

Senator NUNN. So you are in a position of not having requested counsel but having been informed that counsel would represent you and you do not object?

Mr. HUNEYCUTT. Yes, sir.

Senator RUDMAN. Mr. Chairman?

Senator NUNN. Yes, Senator Rudman.

Senator RUDMAN. Mr. Chairman, would it be proper—I'm perfectly happy to withhold—but at this juncture to just ask a question concerning representation of these two gentlemen by Ms. Spooner?

OPENING STATEMENT OF SENATOR NUNN

Senator NUNN. Let me do this, if I could make a suggestion. Let me lay out the litany here and then I will recognize you for the first question on that.

Since December 1987, the Subcommittee has been reviewing allegations which have been made regarding the Department of Justice and its actions regarding its contract with INSLAW, Incorporated. As that investigation is not yet concluded, the Subcommittee, as is its usual practice, had not, prior to today, issued any public findings nor released any materials pertaining to that investigation, nor had we intended to.

This morning, however, I found it necessary to call this public hearing of the Subcommittee to consider objections which the Department of Justice, as I understand it, at the express direction of Attorney General Meese, raised this morning to the continuation of private Subcommittee depositions of Justice Department employees previously scheduled for today. We are meeting this afternoon so that all the members of the Subcommittee can be advised and fully consider these objections. I have directed both the attorney from the Department, Sandra Spooner, as well as the witnesses who have been subpoenaed for deposition today, Mr. Thomas Stanton and Mr. Robert Huneycutt, to appear here this afternoon to present those objections to the full Subcommittee.

Before turning to our witnesses for reading of their statements or for questions, I would like to give a chronology of the Subcommittee's efforts to obtain the cooperation of the Justice Department in this investigation leading up to the events this morning. This will take 4 or 5 minutes but I think it is necessary for the record and for public understanding of where we are now and why we are here today.

In December 1987, the Subcommittee began an inquiry regarding actions allegedly taken by the Department of Justice with respect to INSLAW, Inc. In a ruling by the U.S. Bankruptcy Court for the District of Columbia in an adversary proceeding brought by INSLAW against the Department, serious questions of impropriety were raised with respect to the Department's procurement and contracting practices, its administration of the bankruptcy program, and its willingness to detect and prevent situations of actual or apparent conflict of interest. Similar allegations arose subsequent to the litigation which were also the subject of the Subcommittee's review.

Approximately April 14, 1988—the Subcommittee Chairman authorized the formal investigation of the above.

April 26, 1988—as Chairman I wrote Attorney General Meese formally requesting the cooperation of the Justice Department in the Subcommittee's investigation. The Chairman's letter specifically asked that the Department make available Justice Department officials and employees with knowledge of the Department's dealing with INSLAW, Inc.

Late April and early May 1988—the Justice Department staff and Subcommittee staff discussed the request on several occasions. In response to the request, the Justice Department staff suggested that the Subcommittee delay any interviews of Justice employees pending resolution of litigation between the Department and INSLAW. The Subcommittee, via staff, responded that given the serious nature of the allegations, it was unable to suspend the investigation indefinitely while the litigation proceeded.

Around May 17, 1988, in a meeting with Subcommittee staff the Department of Justice advised that a Departmental attorney would have to be present during any Subcommittee interviews of Departmental witnesses or employees, and further stated that the attorney present would be a member of the Department's litigation team in the INSLAW case. The Department then advised that those individuals were all currently occupied in preparing the Department's appellate brief in the INSLAW litigation and that the Department would therefore be unable to proceed with such interviews until after the filing of the Department's brief.

On June 1, 1988, in a meeting with Subcommittee staff, Assistant Attorney General for the Civil Division, John Bolton, again conveyed to the staff the Department's position that any of its employees interviewed by the Subcommittee must be accompanied by Departmental attorneys. However, Mr. Bolton suggested the possibility during this meeting that Departmental attorneys other than those from the litigation branch could be used during the Subcommittee's interviews. The staff agreed to raise this option with the Subcommittee.

In June of 1988, the Subcommittee decided that given the Department's insistence on the presence of an attorney representing the Department, as opposed to the individual witness, the Subcommittee would conduct sworn depositions of Departmental employees in the presence of Senators. This position was relayed to the Department.

In June to July, 1988, the Department of Justice subsequently changed its position and once again stated that members of the Department's litigation branch would attend the depositions. Upon being informed of the Department's position, the Subcommittee decided that if Justice insisted on the presence of an attorney representing the Department, the Subcommittee would in fairness, given the pending litigation, also allow an attorney representing INSLAW, Inc. to attend the depositions. The Subcommittee gave the Department the choice of proceeding with depositions at which no attorneys were present other than the deponent's personal attorney, or to proceed with depositions at which representatives of the Department's litigation team and INSLAW would be allowed to attend as spectators.

Mid to late July—the Justice Department considered those options for several days and advised the Subcommittee staff that the Department would make persons available for depositions in the presence of the Department of Justice litigation lawyer as well as a lawyer representing INSLAW. They advised that they were agreeing to this under protest and reiterated their objections to the presence of the INSLAW lawyer. The Justice Department advised that subpoenas would be unnecessary and that the individuals would appear.

Late July to early August—the Subcommittee staff, working with the Justice Department staff began scheduling depositions with selected Justice Department employees. In early August, the Subcommittee was informed by the Department that one of the individuals it had requested to depose, Mr. Thomas Stanton, had refused to appear before the Subcommittee voluntarily. Therefore, on August 5, the Subcommittee served a subpoena upon this individual to appear before the Subcommittee on August 11.

August 9, 1988, the Subcommittee began deposing employees from the Justice Department. At the conclusion of the deposition scheduled for that day, Ms. Sandra Spooner, the Department attorney present in the deposition, inquired of the staff as to the availability of transcripts of the depositions. Ms. Spooner was informed that the staff would inquire with the Subcommittee's Chief Clerk as to the Subcommittee procedures in this regard and inform her the following day.

August 10, 1988—prior to the start of the deposition scheduled for that morning, the Department raised objections to the Subcommittee's procedures in connection with the depositions and demanded that the Department be provided with daily transcripts of each deposition. The Department also stated that it was its intention to withhold its witnesses from further depositions unless such transcripts were made available.

The Subcommittee informed the Department that its depositions were private and that the Subcommittee rules provided for a witness and/or witness' counsel to review transcripts of his deposition for accuracy under the supervision of the Subcommittee or its staff. The Subcommittee further informed the Department that it would not provide copies of transcripts to the Department for its own use. However, the Department also was informed that should further circumstances necessitate a need by either the Department or the witness for a copy of the transcript, they could, in accordance with the Subcommittee's rules, petition the Subcommittee to again consider release of the transcript at that time. In other words, there was no advance guarantee of transcripts but rather a willingness to consider later requests for transcripts on an individual basis. The Department agreed to continuing the depositions after making an objection on the record to the decision of the transcripts. The deposition proceeded on that basis.

August 11, 1988—and that gets us up to this morning—Justice Department counsel and witnesses arrived and advised the Subcommittee staff that Attorney General Meese in a meeting at 8:30 this morning had instructed the witness and Justice counsel to refuse to participate in the depositions scheduled for today unless the Subcommittee agreed to two conditions; number one, that coun-

sel for INSLAW not be allowed in the deposition room; and number two, that the witness receive a copy for his possession of the final deposition transcript.

Counsel for the Justice Department advised that this would be the Department's position as to any and all Justice Department employees scheduled to be deposed by the Subcommittee. These objections were presented to me as Chairman and to Senator Cohen by the Justice Department attorney at which time I directed the Justice Department attorney, as well as the witnesses, to be here today at 2 o'clock so that we could lay all of this out on the record.

I am informed there is a vote on. We will take about a 10 minute break and be back and at that stage, Ms. Spooner, we will be glad for you to make any corrections you may have to this factual presentation.

Ms. SPOONER. Thank you, Mr. Chairman.

[Brief recess.]

Senator NUNN. The Subcommittee will come to order.

Ms. Spooner, do you want to add to, delete, or correct in any way the recitation of facts about what has transpired?

Ms. SPOONER. Just very briefly, Mr. Chairman.

Senator NUNN. Also, I understand Mr. Bolton is in the audience and perhaps you would like him to come up and join you since I understand he is your immediate superior.

Why don't you go ahead?

Ms. SPOONER. On the whole, Mr. Chairman, your summarization of the facts seem to us to be a very fair summarization. But two points need to be made in our view to clarify matters.

First, I consulted with the Subcommittee staff last Friday on the transcript issue. While I'm told now that there was a misunderstanding, I came away from that conversation convinced that I had been told that the Department of Justice would be supplied with a copy of the transcript, and it was on that basis that I informed my immediate superiors of what I understood the procedures to be used by the Subcommittee were.

Obviously, when I learned on Tuesday that my understanding was incorrect, I informed my superiors of that fact. They considered the matter and reconsidered the matter and came to the conclusion that we have previously voiced.

Senator NUNN. When you say "supplied," we have made it clear today and before that we will be delighted for you to come over as the attorney for the individual witness and review the transcript as long as you need to in our offices. But our rules require us to keep those transcripts in our own control unless we have a formal Subcommittee meeting and it is just impossible for us after every deposition to have a formal Subcommittee meeting.

As you understand, I hope, we do not exclude the possibility of turning the transcripts over to you for your own information once a case is made and the Subcommittee has a meeting. But we cannot have a meeting of the Subcommittee every time we have a deposition. So I guess that's clear to you now.

Ms. SPOONER. I do understand that now, Mr. Chairman, but what I intended to say is that on Friday I believe I was told that the Department of Justice would be supplied with a copy of the transcript. That was very significant to me and I think it was signifi-

cant to my superiors as well because it permitted us to have a record of what transpired.

Because I conveyed to my superiors on Tuesday that we would not be afforded a copy of the transcript, it was necessary, I believe, for them to reconsider the propriety of proceeding under those circumstances.

Secondly, I believe there may have been a misunderstanding between the Justice Department and members of your staff regarding the options available for interviews and depositions of Government witnesses. It was not our understanding that it was possible for our witnesses to be interviewed in private with DOJ counsel being present, although not a member of the litigating team, and that there would be in that circumstance no INSLAW attorney present. It was our understanding that if any Department of Justice attorney attended the interviews or the depositions an INSLAW attorney would be present.

Under those circumstances, the Department would want to consider whether, in the absence of an INSLAW attorney and the presence of a non-litigation team Justice Department attorney, we could go forward with private interviews—not depositions, but private interviews.

Senator NUNN. So would you state now—making sure for the record, and then I will ask Ms. Hill to respond—would you state what your position was this morning and what your position is now, if they are two different positions or if they are the same. What is the position of the Justice Department as of this morning and what is the position of the Justice Department now about complying with the subpoenas and having the witnesses testify?

Mr. BOLTON. Mr. Chairman, if I could address that; I appreciate your asking me to come up here. Our position had been and indeed we thought we had an understanding with Subcommittee staff some time ago that the investigation involving Department employees would proceed on this basis, that there would be interviews by staff of Department of Justice employees involved in this matter, that the employees would be accompanied by a Department of Justice lawyer.

As you correctly noted in your introductory statement, I think I had originally offered some months back that that lawyer not be a member of our litigation team, our INSLAW litigation team, if that were an issue of concern to the Committee. Now, subsequently, it is apparent that whether through misunderstanding or mis-communication or however it arose, that that initial understanding was lost.

But we are fully prepared right now to revert to that understanding if it would be acceptable to the Committee. I think that would permit the Committee's work to continue with a minimum of interference with the ongoing litigation.

Senator NUNN. Would the attorney present at that kind of interview represent the witness or would the attorney present represent the Justice Department, or would the attorney present attempt to represent both the witness and the Justice Department?

Mr. BOLTON. The answer to that is both, to the extent that the questioning involves the employee witness' actions as an official of the Department of Justice, and that would be consistent with the representation practice that we assume in any adversary proceed-

ing in court or in any matter pending before a Congressional committee, and that is codified in our Departmental regulations.

Senator NUNN. Ms. Hill, do you want to respond to the misunderstanding?

Ms. HILL. I don't believe there has been a misunderstanding on these particular facts. I think we are both recollecting the same thing. Mr. Bolton came to our offices and met with us, I believe in early June of this year, and it was at that point that we discussed whether or not interviews could be conducted. The Department had originally requested interviews in the presence of a litigation lawyer from the Justice Department. The Subcommittee had concerns about that. Mr. Bolton suggested that, Justice might not object to having a lawyer from another branch of the Department, not the litigation team, present, and I believe he suggested the Congressional Affairs Section.

But in any event, it was my understanding at that meeting that the lawyer would be attending the interviews not representing the witness but representing the Department's interest. We went back to the members of the Subcommittee and advised members of the Department's position. There was still some concern since the attorney was not representing the person, but rather was representing the Department's interest. The members agreed that we should not have an attorney representing that interest, given the litigation, at an interview as opposed to a sworn deposition. And it was then that the Committee decided that rather than an interview we would conduct sworn depositions, given that insistence on the presence of a Justice Department attorney representing the Justice Department.

We then went back to the Justice Department, advised them that rather than interviews, it would be sworn depositions, and Senators would attend. I was then told that we could begin scheduling the depositions. The Justice Department then came back and said, we will make people available for the depositions; however, the attorney will not be from another branch of the Justice Department, he or she will be from the litigation section. And it was at that point that we went back to the Subcommittee and the decision was made that if any litigating attorney was present, we would give the Justice Department either the option of no attorneys or attorneys from both sides of the litigation.

Mr. BOLTON. Mr. Chairman, if I could, I think I may have just heard what the source of the confusion was, and if I might, maybe I can clear it up. I believe Ms. Hill is correct that my initial recommendation, or the suggestion that I threw out at the meeting, was that an attorney in the Office of Legislative Affairs might be the lawyer who would represent the Department's witnesses.

In subsequent conversations, it was apparent that that office's work was sufficiently overwhelming that a lawyer really could not be spared for the amount of depositions that appeared to be in prospect. I think the initial witness list supplied by the Committee had around 15 names on it and it appeared that might be fairly extensive.

So what I proposed in discussions with my colleagues at Justice would be that someone else from the Civil Division, although not from the INSLAW litigation team, would be the Departmental

lawyer who would accompany the witnesses, and I wasn't looking to place the extra burden on my fellow attorneys in the Civil Division, but we have nearly 500 attorneys as opposed to Legislative Affairs' six attorneys. So it seemed to make more sense to do that.

Now, if that was the confusion—because, obviously, everybody in the Civil Division is a litigator—perhaps that can be cleared up. But it would be our intention not to have someone from the litigation team itself representing the employees.

Senator COHEN. Mr. Chairman?

Senator NUNN. Just one second, Senator Cohen. Let me just make this point. Our concern all the way through here has been, first of all, that the witnesses not be intimidated by the Department of Justice, by anyone else.

Mr. BOLTON. We share that interest, Mr. Chairman.

Senator NUNN. And, too, that the witness have representation of their personal counsel. We always accord a witness personal counsel, but when the Justice Department continues to insist that members of the litigation team, including people representing the Justice Department as a defendant in a lawsuit, be present for every witness interviewed, some of which may testify detrimental to the Justice Department, it has raised serious questions with us about both intimidation of witnesses and also in terms of possible conflicts of interest between Justice's position and its representation of the individual.

Let me go to Senator Cohen, or Senator Rudman. I promised Senator Rudman, and then Senator Cohen.

Senator RUDMAN. I would like to ask Mr. Bolton, since he is now here, and also Ms. Spooner: your representation procedure of Department employees in matters needing counsel regarding their official duties is codified—is that what you said?

Mr. BOLTON. That is correct.

Senator RUDMAN. What does that code or regulation indicate you should do when any serious allegations from what could be considered a reputable source are made as to possible criminal wrongdoing? What do you do then?

Mr. BOLTON. The regulations—I don't have a copy with me but we would be happy to suppiy it to the Committee—our off the top of our head recollection is that it is 28 CFR 50.15. Our regulations specify that when there are allegations of criminal wrongdoing the Department must make a determination there, as it would in any conflict situation, that the interests of the employee and the interests of the United States still coincide, because we have no authority under the regulations to represent anyone when it is not in the interest of the United States to do so.

We routinely make decisions of that nature. We have within the Civil Division what we call the representation committee to resolve difficult issues raised like that. And it is not always in cases of alleged criminal wrongdoing that we won't represent a Federal employee. That is only in cases involving allegations of Federal criminal behavior. We routinely represent employees of the United States Government in State criminal proceedings where those interests are consistent with those of the United States.

Senator RUDMAN. But not in Federal?

Mr. BOLTON. Not where we believe that the allegations are sufficiently serious that they would put that individual in conflict with the interests of the United States, and we have—to answer your question specifically—in this case determined that whatever allegations there are out there—and frankly, it's a bit of a moving target—that none of them are either serious enough in terms of their substance or in terms of any issue that would raise a conflict that would pose a problem for us in our representations.

Senator RUDMAN. Of course, I have a problem with any opinion you have, as much as I respect you personally, because you are a party to the case, the Justice Department is part of the case. Of course you are going to make decisions. I mean, none of us was born yesterday.

I want to point out to you that I am very familiar with the code you just cited. As you know, I wear a different hat in this place. I Chaired for four years and am now Ranking Member on the Appropriations Subcommittee that deals with your budget. I want to point out to you—and I will be very brief, Mr. Chairman—that in the Judge's findings, and I do not know whether they are right or wrong, the Judge may have been totally wrong, but a Judge, a Bankruptcy Judge of the United States who at that time was in good standing says, quote, "the second basic finding is that the Department of Justice took, converted, stole INSLAW's enhanced PROMIS by trickery, fraud and deceit," et cetera, et cetera.

You know, I am not saying that those charges are true, false, valid or invalid. As a former attorney general in my State who made these decisions for State Government, I am appalled that you can have a Justice Department attorney sitting here representing these men in their personal capacities in the light of those kind of allegations by a United States District Court Judge of the Bankruptcy Court.

Will you tell me how you can do that? Because, frankly, it stands on its ear every legal principle I have ever known about fairness to these gentlemen as well as fairness to the Department.

Mr. BOLTON. Very briefly, Senator, one of the reasons that we have appealed the Bankruptcy Judge's findings is because, as we have argued in our briefs to the District Court, he was extraordinarily biased against the Department in the conduct of the trial. We have considered what he has said. We have concluded in our best legal judgment—and I might say in the legal judgment of all of the career Department of Justice attorneys who have examined the matter—that he is simply wrong.

But it also points out what to us has been a fundamental difficulty and concern for the entire conduct of the Committee's investigation. We do have this matter on appeal. We have just recently filed a very, very extensive brief detailing all of the reasons we think the Bankruptcy Judge's findings were wrong, throughout. We have moved for a new trial, too, because the whole proceeding needs to be done over.

Senator RUDMAN. We are familiar with all the history, Mr. Bolton. I do not want to carry this on, Mr. Chairman. You have got other things to do.

Let me just simply say that I do not accept the ability of the Justice Department, even if you have got the best judgment in the

world, to make that kind of a judgment in this kind of a case regarding employees who ought to be personally represented. They are entitled to that. No one can convince me that there is not an inherent or actual conflict existing. They should be represented personally. There should be no communication between their personal counsel of their own choosing and the Justice Department except as necessary for discovery.

I intend to write to the new Attorney General pointing out what is going on here because this is a procedural matter, but I find it difficult to sit here on a Committee looking at people paid for by the United States taxpayers representing people in their individual capacities in light of these charges, which well may be false, but they are entitled to have them proven false and not be represented by Justice Department counsel. And if these people have any thoughts about them, they will get their own lawyers pretty darn quick. I would tell them that from here.

Mr. BOLTON. If I could just add, Mr. Chairman, with your indulgence, I think it is important for the Subcommittee to understand that the decision in this particular matter is consistent with longstanding Department of Justice policy and was carefully reviewed through all of the normal channels.

There is nothing different about the way this matter is being handled than any of countless other representational matters.

Senator RUDMAN. You just might have been wrong for a very long time.

Senator NUNN. Have you had countless representations in cases where Bankruptcy Judges have found that the Justice Department through, "trickery, fraud and deceit took, converted and stole matters belonging"—I mean, it seems to me, if we had had countless cases like that against the Justice Department of findings by a Bankruptcy Judge, maybe the problem is bigger than we think.

I just cannot believe that this is a usual, routine, kind of case.

Mr. BOLTON. Clearly, it is a pretty unusual case where you have a Judge that biased, Mr. Chairman. But there are instances where employees of the Federal Government are accused of State crimes because actions taken in their capacity as Government employees, probably 20 or 30 a year, where we routinely represent those employees.

Senator NUNN. But Mr. Bolton, this is a case where a Judge has found that the Department itself, the Department of Justice itself, the top law enforcement agency in the United States itself, has been involved in trickery, fraud and deceit and has taken, stolen and converted.

And now you are saying this is just like any other case. You are not only representing yourself but you are also insisting that you have your litigation team—you have all the way through this—be present in every interview and/or deposition. Now this morning you insisted that the other side of the case not be allowed to be present. And that is why we are here today.

It seems to me that a very elementary consideration in the Department of Justice has to be that there be not only propriety but also the appearance of propriety and the appearance of fairness in these proceedings. And that is why we have been concerned about the insistence over and over again that we exclude one party to the

case and permit the litigation team for the other party to be present. I just think that defies fundamental fairness.

Mr. BOLTON. Well, Mr. Chairman, as I have said, we are more than willing to have somebody not on the litigation team present. But I would say also in terms of fundamental——

Senator NUNN. Are you willing to wall them off from the litigation team and say that they will not go right back and tell the litigation team everything that——

Mr. BOLTON. You raise a very difficult problem there, Mr. Chairman. Let me lay it out.

Let's assume that somebody—and I am obviously not referring to witnesses present here—but let's assume that somebody, some employee of the Department of Justice, has testified under oath in the bankruptcy proceedings. Let's assume further that before your Subcommittee he testifies exactly to the contrary. Now, if another Department of Justice lawyer is present, the Department of Justice knows that there is a conflict in the testimony and as officers of the court, Mr. Chairman, I think we would be duty-bound ethically to consider whether to advise the court of what had happened.

So I do not think we could agree to that. I do not think ethically we could.

Senator NUNN. It seems to me that gets back to Senator Rudman's basic point. It would solve a lot of questions if you just would help these gentlemen have their own counsel. Then it would indeed not pose that kind of conflict. I just think there has been almost an immunity to the basic sensitivity of the conflict of interest in the Justice Department.

Mr. BOLTON. Well, there is no conflict in this situation, Senator. We have looked at that question very carefully.

Senator NUNN. Well, it has got the appearances all over it.

Senator COHEN. Mr. Chairman, I would just point out that while the Justice Department maintains that the Bankruptcy Judge was inherently or fundamentally biased, that is precisely the charge that INSLAW has lodged against the Justice Department being fundamentally biased, and I do not know where the facts would fall on that one.

My question has to do with an issue you just raised. If you are to have an interview situation and the Justice Department were to have a non-litigating attorney present, for all practical purposes, what does that mean? You have indicated there would be no Chinese wall erected between the non-litigator and the litigating department. I would assume that the purpose of having a non-litigating attorney there would be to take notes, to pass on that information to the litigators.

So for all practical purposes you have an agent of the litigating department representing the Justice Department.

Mr. BOLTON. The purpose of having a lawyer there would be to protect privileges as well. There might be a host of things that could come up. That is one of the reasons, Senator, why we urged that the Subcommittee not proceed with the investigation. This matter is on appeal. We are confident that we will be vindicated. The matter has been briefed by us. We have no idea, of course, when the court will rule.

But we have challenged virtually every aspect of the Bankruptcy Judge's handling of the proceedings and under normal circumstances, quite frankly, where there is pending litigation, as Senator Rudman knows, we would not agree to cooperate at all because of the risks to the litigation.

There are very substantial financial interests of the United States involved in this case and there are a number of substantial questions of both bankruptcy and contract law that could well affect millions and millions of other dollars. We have no problem at all with the Committee conducting an investigation at a point in time when the litigation is resolved. But where it risks damage to the litigation and unfairness to all the parties in it, we had asked the Committee staff not to proceed.

Senator NUNN. Mr. Bolton, I think it is unusual for the Department of Justice to believe that the legislative branch would not have an interest when the top law enforcement department has been accused by a Federal Judge under a finding that is now under appeal of converting and stealing, of fraud and deceit. This is not simply an allegation. It is a finding.

You know, we have got statutes that remove people from top offices in companies, both management and unions, who have been found guilty while an appeal is pending. They are actually removed from office, and here you are saying that the legislative branch should not look at the Justice Department and not have any investigation after an adjudication by a judge while the appeal is pending. It seems to me that that is the ultimate in double standards.

Mr. BOLTON. Quite the contrary. That is why we have tried to cooperate with the Committee. As I said, the normal rule is that we would not provide anybody or any witnesses or any documents, but because we are confident that we will be vindicated, we have tried to do this in a way that would minimize the interference in the litigation. That is why, as you noted in your introduction, we had originally asked that the interviews not proceed while our litigation team was briefing the appeal, because it would have put an insuperable burden on our career attorneys, both to have to try and write the best possible brief, and also to be representing the witnesses before the Subcommittee.

Senator NUNN. I guess everybody that has an appeal, whether it is when the Justice Department is prosecuting someone or any other person under appeal, always thinks they have a chance of having the decision reversed, but you are saying that we ought to just assume that this is going to be reversed and therefore just let you alone while this is all going on. I don't understand that.

Mr. BOLTON. No, Mr. Chairman, with all due respect, I am not asking that you assume that it is going to be reversed. We have made the point that we are willing to have our witnesses come up here. We are really at this point, I think, separated only by a very narrow range of disagreement and I am reluctant to trouble anyone here further when I think at least we had had a proposal for discussion and are more than happy to continue those discussions.

Senator NUNN. We are right back to—today your latest proposal is right back where we started all of this, but it is a rather awkward time to go to that proposal now.

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Senator ROTH. Mr. Chairman, I can sympathize with that latter statement. As a matter of fact, the real problem is we do not know what the facts are and what has concerned me, as has concerned this Subcommittee in general, is that we have not secured the kind of cooperation that we think is essential in this kind of investigation.

But what I would hope, Mr. Chairman, is that somehow we could proceed with our investigation and not get bogged down with respect to procedures and a confrontation. I would just point out, that this afternoon we are going to vote on the confirmation of a new Attorney General. I would hope we could try to explore if there isn't some way we can get this off dead center and proceed in securing what the basic facts are.

As Mr. Bolton has said, the position of the Justice Department is very close to our original request; although a little late, I might add.

Senator NUNN. Several months and an awful lot of difficulty. It looks like you have had us jumping through one hoop after another and frankly we are getting a little tired of it.

Senator ROTH. But I think you and I share the same desire to get the facts.

Senator NUNN. I agree with that.

Senator ROTH. And anything that we can do to move in that direction I think would be a step forward and I just urge that we try to see if we cannot work out a procedure that will be satisfactory.

Senator NUNN. Thank you, Senator Roth.

Senator Cohen?

Senator COHEN. Mr. Chairman, it is not only important that we get the facts, but that we get them fairly, and it seems to me that we run into a basic problem if we were to return to the original proposition that we conduct interviews with a non-litigating attorney from the Justice Department present with the statement, as Mr. Bolton has laid it out that he would feel an absolute obligation to have that attorney consult with the litigating department.

Then it seems to me we are conducting a one-sided investigation where INSLAW is excluded, but the attorney representing the Justice Department is present during the course of those interviews and passing the information on to the Justice Department so that it can reconcile whatever testimony is given or information is given with previous testimony. And that to me is not only gathering facts, but it is gathering them in a sort of a one-sided fashion or a unilaterally unfair fashion.

Senator NUNN. I don't know how we rectify that.

Mr. BOLTON. Mr. Chairman, if I could respond to that. We had originally agreed with the Subcommittee that counsel for INSLAW could be present. I might say that's the first time to my knowledge that there has ever been a circumstance like that, at least as far as I know. I raised this morning with the Attorney General where we were in this proceeding at our morning staff meeting and in the course of that mentioned that counsel for INSLAW were present. And that was the first time that the Attorney General had been briefed for quite some time about the Subcommittee's interest in the INSLAW matter.

At that point he said we are not going forward with the depositions as long as INSLAW's counsel is present and as long as we were not receiving copies of the transcript of the depositions. Now, as one possible way to resolve this—and I have no idea what the next Attorney General's position is, I do not believe he is acquainted with the INSLAW matter in any detail—is that this would be one of the things that I would want to discuss with him as soon as he is able to come on board at the Department, because it is a matter that it is perfectly obvious to us that our opponents have done a very effective job on press relations and it is certainly one that we would need to brief him on.

It could well be that he would have a different view than the present Attorney General. As I say, I do not know. I have not spoken with him about it in any detail. Our position had been—and I regret the shift, but one takes one's orders from one's boss—though perhaps not happily, but we had agreed to INSLAW's counsel being present. I would ask the Committee's indulgence so that I have the opportunity to brief the new Attorney General and to put that option to him.

Senator RUDMAN. Mr. Chairman?

Senator NUNN. Let me call on Senator Levin. He had his hand up and I will get right back to you, Senator Rudman.

Senator LEVIN. As I understand it, the decision was made this morning you would not go forward with the depositions under these circumstances?

Mr. BOLTON. Under the circumstances where counsel——

Senator LEVIN. Without repeating them.

Mr. BOLTON. I want to be sure the record is clear what the circumstances are.

Senator LEVIN. As you have described them.

Mr. BOLTON. Because of the two circumstances I have described; correct?

Senator LEVIN. The Justice Department decided this morning that it would not proceed with the depositions under those circumstances?

Mr. BOLTON. Those were the Attorney General's directions, yes.

Senator LEVIN. Were your clients advised of that?

Mr. BOLTON. I did not personally advise them. I believe that they were certainly told. I believe Ms. Spooner told them what the circumstances were.

Senator LEVIN. Now, are your clients making up their decision? Is this a recommendation to them or are you telling them they are not going to proceed?

Mr. BOLTON. I think because of the circumstances in which it arose, because of the nature, we told the two witnesses who were scheduled to testify today what had happened and that the deposition which I believe had originally been scheduled for 10:00 a.m. this morning would not go forward pending further discussions with the Subcommittee.

Senator LEVIN. The Justice Department decided this?

Mr. BOLTON. That's right, that because of the Attorney General's direction, the 10:00 o'clock deposition, obviously, the first one, would not proceed.

Senator LEVIN. Your clients didn't decide that, you decided it?

Mr. BOLTON. That's correct.

Senator LEVIN. Is that what you call a lawyer/client relationship? [Laughter.]

Mr. BOLTON. I believe in those circumstances that that is a tactical decision that a lawyer might well make. I do not think it is particularly funny, either. In any event, we were——

Senator NUNN. I don't either, because you have basically taken the Justice Department position and imposed it on the people you are supposedly representing. They were not asked, they were not consulted, they were simply told that the Attorney General had decided that the Justice Department's position was that they would not testify and therefore they would not testify.

It seems to me that gets right to Senator Rudman's——

Senator LEVIN. That's the conflict.

Mr. BOLTON. There is no conflict. The only——

Senator LEVIN. Well, you did not recommend anything to your clients. You directed them as their employer.

Mr. BOLTON. Senator, as you well know, in the course of a deposition an attorney is frequently faced with the need to instruct the witness not to answer a question. I have done it probably hundreds of time in depositions.

Senator LEVIN. And that is based on prior advice to the client and agreement with that client on a certain course of conduct. Here you have a decision of the Justice Department as the employer of these people instead of their lawyers. If that is not a built-in conflict, I do not know what is.

Mr. BOLTON. As I understand it, the only interest that the Subcommittee has in any witnesses from the Department of Justice relates to the actions that they took in their official capacities as employees of the Department of Justice. So from that point of view, under standard conflict-of-interest analysis, there is no conflict.

Senator LEVIN. One other question. Could I just ask one additional question here.

Do you have the regulations of the Department of Justice, precedents at the Department of Justice, where you have directed an employee of the Government not to cooperate with a Congressional Committee with jurisdiction over the subject matter because of a pending civil appeal?

Mr. BOLTON. We—well, because of——

Senator LEVIN. Can you give us the regulations of the Justice Department that say that you will not cooperate with a Committee of jurisdiction because of a pending civil appeal? Give us the regulation number and the precedent, the names of the cases where you have refused.

Mr. BOLTON. First, Senator, I do not believe that I testified that that was codified. The codification to which I was referring was the codification of our representation practice and it does not refer specifically to that situation.

Senator LEVIN. I did not say you had testified.

Mr. BOLTON. In the case that you have just mentioned where there is a pending civil appeal, frankly, I would have to check to see if there have been circumstances where we have even been asked about the pendency of an appeal in a civil case. I have been at the Department since December of 1985 and I am reasonably

certain that this is the first civil case that has actually been pending that we have ever been asked to provide any witnesses.

Typically it arises in the context of criminal proceedings where, of course, there is 6(e) material and a number of other things that preclude us expressly from providing that.

Senator LEVIN. Would you supply to the Subcommittee any regulation of the Department of Justice or any precedent for a refusal to cooperate with a Congressional Committee in an investigation where they have jurisdiction because of the pendency of a civil appeal? I want you to, if you would, supply that for the record.

Mr. BOLTON. I would be happy to supply it.[1]

Mr. BOLTON. But let me say also, Senator, that we are trying to cooperate with the Subcommittee, as I have said before, even despite the extraordinary circumstance of a matter being in litigation and yet being investigated by a Congressional Committee at the same time. We have attempted to work with the Committee to permit your investigation to go forward.

Senator ROTH. Would the Senator yield for a further question.

Senator LEVIN. I am through. Thank you.

Senator ROTH. Isn't there a Department of Justice regulation as to whether one of its employees can testify in any proceeding involving official action?

Mr. BOLTON. There may well be, Senator. I would not want to foreclose it, but I do not have our regulations with me and have not had an opportunity to check. It is certainly a common occurrence for Department employees to be called as witnesses both before Federal courts and before Committees of Congress and the general policy has certainly been where it is not otherwise precluded or inadvisable to do so.

Senator ROTH. Ms. Spooner, did you have some comment?

Ms. SPOONER. Senator Roth, I know of regulations in the Code of Federal Regulations that apply to Government witnesses testifying in lawsuits, and I believe there are also some regulations that deal with when Federal employees—specifically Department of Justice employees—may give out information that they had learned in the course of their duties and that came from Justice Department files. I do not know of its applicability to Congressional proceedings but we could look into that.

Mr. BOLTON. We would be happy to supply it to the Committee in any event.

Senator NUNN. Senator Rudman?

Senator RUDMAN. Thank you, Mr. Chairman.

Mr. Bolton, the original decision to cooperate with the Committee and to allow under the circumstances we now have agreed on—for INSLAW attorneys to observe—was the final analysis made by you?

Mr. BOLTON. I do not know whether to claim credit for that or not, but certainly Mr. Boyd, who is Acting Assistant Attorney General for Legislative Affairs, and I discussed it on numerous occasions and came to this conclusion, yes.

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[1] See p. 25.

Senator RUDMAN. And you were overruled today by Attorney General Meese?

Mr. BOLTON. That is correct.

Senator RUDMAN. And you are now going to be in a position, if we do what I think we—at least what I—would like to do, would you recommend the same thing to Attorney General Thornburgh, that we do it this way, with INSLAW's attorneys present?

Mr. BOLTON. Well, I would say, Senator, that I am quite concerned about the transcript question.

Senator RUDMAN. That aside, let's just talk about INSLAW's attorneys being present. Let's compartmentalize the issues. Are you going to make the same recommendation?

Mr. BOLTON. Yes.

Senator RUDMAN. Fine.

Mr. BOLTON. As I say, I was willing to agree to it before; not happily, but I was willing.

Senator RUDMAN. I would just say, Mr. Chairman, that I thought that would be Mr. Bolton's answer. I think, Mr. Chairman, that it is probably not the best thing in the world for Attorney General Thornburgh who is just about to be confirmed, I guess——

Senator NUNN. I don't think we have voted yet.

Senator RUDMAN. We are supposed to vote at about 4 o'clock.

Senator LEVIN. I guess we missed it.

Senator NUNN. I hope not. [Laughter.]

Senator RUDMAN [continuing.] To face a confrontation with the Congress precipitated by his predecessor on his last official day of duty. I'm not sure that is the way we ought to greet him.

Senator NUNN. Maybe this is just an incentive for us to go ahead and confirm him, all of this we have gone through today.

Senator RUDMAN. I agree. We have had a lot of incentives.

Senator LEVIN. I agree. [Laughter.]

Senator RUDMAN. I would hope that we would give Mr. Bolton an opportunity to go on in. And finally, Mr. Chairman, I would just like to ask one brief question of Mr. Stanton and Mr. Huneycutt.

Senator NUNN. I think it ought to be procedural because so far they are in a position of not testifying.

Senator RUDMAN. It is procedural. It is not factual. No, I understand that, Mr. Chairman. I would not ask them a factual question. Some people say I never ask factual questions. [Laughter.]

Mr. Stanton, has anyone at the Justice Department at any time outlined to you any personal risks involved based on the findings made by the Judge, pointed out the personal risks to you?

Mr. STANTON. Very, very briefly.

Senator RUDMAN. And who was that?

Mr. STANTON. Ms. Spooner.

Senator RUDMAN. Was it recommended to you that you might want to acquire personal counsel?

Mr. STANTON. Certainly it was suggested that that was an option to me.

Senator RUDMAN. Were you told that the allegations, if true—I am not assuming that they are true or anything—but if true, constituted criminal conduct under the U.S. Criminal Code and there were possible criminal charges that could flow from that kind of allegation, if proven? Were you told that?

Mr. STANTON. Not specifically, no.

Senator RUDMAN. Not specifically. So you were not told that——

Mr. STANTON. But, Senator, I know that those charges were absolutely false. So you see, that's why——

Senator RUDMAN. I do not want to get into the substance here, remember. I did not ask a factual question so I do not want substantive answers. I am simply asking you a limited question as to whether or not—I know a lot of former people I prosecuted who thought they were innocent and they are in the New Hampshire State Prison. So let me just—and they were not innocent—let me just say to you one more time very, very specifically, Mr. Stanton, did anybody tell you that there was some gravity of criminal charges flowing from this Judge's finding, be they accurate or not? Were you told that?

Mr. STANTON. No, I was not.

Senator RUDMAN. Thank you. Mr. Huneycutt, were you told that?

Mr. HUNEYCUTT. No, sir.

Senator RUDMAN. Thank you, Mr. Chairman. That's the question.

Ms. SPOONER. Mr. Chairman, if I could just make a statement in as much as it is really my discussions and recommendations to these gentlemen that are under discussion here.

Senator NUNN. Are you speaking as an attorney now?

Ms. SPOONER. Yes.

Senator LEVIN. Who is your client at the moment?

Ms. SPOONER. My client is the United States, the Department of Justice and these two gentlemen.

Senator LEVIN. You have two clients?

Ms. SPOONER. Counting the United States I have three—four, excuse me.

Senator LEVIN. Are you representing yourself here, too?

Ms. SPOONER. Myself?

Senator LEVIN. Yes.

Ms. SPOONER. No.

Senator LEVIN. Because you are defending your advice to your clients.

Ms. SPOONER. I wanted to——

Mr. BOLTON. Well, Senator, but in all fairness, the questions have been raised about it and I think that it is important for the Subcommittee to have the full record here.

Senator LEVIN. I just want to know, you claim now to represent both these gentlemen and the Justice Department right now.

Ms. SPOONER. Yes. Yes. And Senator, I take those responsibilities very seriously and I recognize my obligations as an attorney first and as an employee and a representative of the Department of Justice and the United States as well. It is my obligation to represent them until I see a conflict in that representation and at that point I will take the steps that I have to take.

But I think it is significant to note that Mr. Huneycutt has not been charged with doing anything. He has not testified as a witness. He has not been discussed in any of the proceedings so far, and it is really unfair to suggest that I should have advised him that he was somehow criminally culpable.

Senator RUDMAN. How about Mr. Stanton? Same answer?

Ms. SPOONER. I do not believe he has been charged with any criminal conduct.

Senator RUDMAN. I did not say charged. Have you read the Judge's finding?

Ms. SPOONER. Yes, Senator.

Senator RUDMAN. You do not think there are a lot of allegations of criminal conduct in that? Allegations, ma'am.

Ms. SPOONER. Allegations. Quite frankly, Senator——

Senator RUDMAN. Not charges, allegations.

Ms. SPOONER [continuing]. I cannot identify with what you are saying.

Senator RUDMAN. Well, just hold on a minute now. Now, we are talking as lawyers. I do not know how long you have been practicing law. We are not talking about that.

I want to read some words to you from a finding in the U.S. District Court. Now, this Judge may be the worst Judge in history. He might be the best Judge in history. I do not know this Judge. Everything he says may be wrong. Everything he says may be right.

I want to read you some words: "The second basic finding is that the Department of Justice took, converted, stole INSLAW's enhanced PROMIS by trickery, fraud and deceit."

Question, a limited question, under your knowledge of the U.S. Code: if proven, do those charges constitute a Federal crime?

Mr. STANTON. Yes, but not by me, Senator.

Senator RUDMAN. I am asking your lawyer.

Mr. STANTON. I was not involved in any of that and I am sitting here, though.

Senator RUDMAN. I am not talking to you. I am talking to this lady.

Mr. STANTON. Excuse me.

Senator RUDMAN. Do those constitute Federal crimes? That is all I am asking.

Ms. SPOONER. Senator, certainly I think theft is a criminal crime.

Senator RUDMAN. Thank you.

Ms. SPOONER. But what I would like to say to you is that Mr. Stanton had absolutely—absolutely nothing to do with that. He was not even involved in that proceeding.

Senator RUDMAN. There are some who would probably agree and some who might not. I would simply tell you that Mr. Stanton is not on trial for anything. Mr. Stanton at this moment is considered an honest, forthright Government employee.

I have a real problem, in light of this kind of Federal court finding, with having the Justice Department sitting here and representing these people. I would recommend they get their personal counsel, because I think there is an inherent conflict because it is quite possible that not even Mr. Bolton or you know what really happened at the Justice Department. We found that out last summer about the White House. I assume it can happen in the Justice Department.

That is all I have, and I do not want to get into the substance here, but I am very unhappy with Justice Department lawyers sitting here representing these two gentlemen today. That is my position. I will communicate it to the Attorney General and, frankly, if

you want to talk about it, you may, but that is the end of my comment on it.

Ms. SPOONER. Senator, may I just simply say that there were two separate proceedings before the Bankruptcy court. One of them is a matter that we call the independent handling matter, and that was a matter in which Mr. Stanton was involved as a witness and in which he was accused of certain conduct.

There was a second proceeding and it was called the adversary proceeding, and in that proceeding Mr. Stanton had no involvement whatsoever, and the language that you are reading from the decision, Senator, is from the second. It did not involve Mr. Stanton at all.

Senator RUDMAN. I am aware of that.

Mr. BOLTON. I would just—and I am sure that Senator Rudman did not intend it—but we are in the position here of having two Department of Justice employees who are here as witnesses and I certainly do not think that the record ought to be left that there is any implication that these two individuals, or anybody else you would name, has engaged in anything even approaching criminal conduct.

Senator RUDMAN. Mr. Bolton, obviously that is not any implication. Let me just answer it for you this way. There are going to be a whole lot of witnesses from the Justice Department and some of them were the subject of this language. That is my point and you do not know who they are because you do not believe the charges. That is the point.

Mr. BOLTON. Senator, if there were, at any moment in the course of this long litigation, any indication to any of the career people who are handling it that there were any kind of problem like that, I can assure you whether I were still in my chair, or my predecessor or my successor, that those career attorneys would do the right thing.

And so far I have reviewed this case myself personally when I assumed this position because of the notoriety it had achieved and satisfied myself that the attorneys who have been handling it have in every measure handled it properly and that if there were any concern for the kind of behavior that you have been speaking about, I am convinced that they are able and sophisticated lawyers and they would have taken the proper steps.

Senator NUNN. Well, whatever the case is, your decision this morning to lay down those two conditions after all we have gone through has put these two individuals through a very rigorous day and taken most of our day here today. It seems to me that at some point someone has to exercise just basic good judgment and sensitivity in the Department of Justice and there has been a scarcity of that in this proceeding for the last three months.

We have had one problem after another and we are right now back where we were several months ago. I think that is all I have to say today.

Mr. Stanton, you understand, do you not, that you were under subpoena to appear before the Subcommittee staff at 10 a.m. this morning for the purpose of providing deposition testimony in connection with the Subcommittee's investigation of allegations relating to the Department's dealing with INSLAW, Inc?

Mr. STANTON. Yes, I do, Mr. Chairman.

Senator NUNN. Mr. Huneycutt, you understand, do you not, that you were under subpoena to appear before the Subcommittee staff at 3 o'clock p.m. this afternoon for the purpose of providing deposition testimony in connection with the Subcommittee's investigations of allegations relating to the Department's dealing with INSLAW, Inc?

Mr. HUNEYCUTT. Yes, sir, I do.

Senator NUNN. I understand that certain objections have been raised by counsel. Counsel, would you repeat those objections in summary form, if you would?

Ms. SPOONER. Yes, Mr. Chairman. The Department of Justice objects to taking depositions that are in the presence of INSLAW's counsel and in circumstances in which the Subcommittee refuses to provide a copy of the transcript of those depositions to these witnesses.

Senator NUNN. Refuses, I would understand your position, to guarantee in advance that a deposition copy will be provided; is that correct?

Ms. SPOONER. That is correct, Mr. Chairman.

Senator NUNN. Having heard your objections in accordance with Subcommittee rules, I overrule both objections and I direct the witnesses to comply with the Subcommittee's subpoenas.

Mr. Stanton, are you willing to proceed into private session for the purpose of allowing the staff to proceed with its depositions?

Mr. BOLTON. Excuse me, Mr. Chairman, if I could. Our understanding in communication with your staff had been that you were going to proceed to conduct the depositions in open session, and we are prepared to go forward on that basis.

Senator NUNN. You are dead wrong about that. I do not know where you are getting all of these understandings but——

Mr. BOLTON. From your staff, Senator.

Ms. HILL. Mr. Bolton, I would just point out for the record that my conversations with Ms. Spooner and other members of our staff is that we would meet this afternoon to consider your objections. There was no mention of any public depositions.

Senator NUNN. Mr. Stanton, are you prepared to proceed in private session for the purpose of allowing the staff to take your deposition?

Mr. STANTON. Senator, I would be very happy to speak before the Senate and the staff in which ever manner you want me to testify, provided I am not in a situation where INSLAW is present. My situation is I was not present at the time that they gave whatever testimony they gave and I now find myself in a situation where I am to go into this meeting without counsel, apparently, and without any knowledge of what has been said and what I am being accused of, other than what—and I——

Senator NUNN. Well, understand, you have the right to counsel. You can have your own counsel.

Mr. STANTON. My own counsel from the Department of Justice?

Senator NUNN. You can have the counsel of your choice. We have our own opinion about whether that is appropriate from the Department of Justice based on conflict of interest, which I think

have been made abundantly clear here today. But you have the choice of having your own counsel.

Mr. BOLTON. But, Senator, you know, in the spirit of cooperation, there is going to be a change at midnight tonight at the Department and if we can just wait 24 hours, perhaps a little bit longer, because I do not know what Governor Thornburgh's schedule is, I am not sure that we have to go through what I believe you are about to go through.

We are in the position of being under instructions from the Attorney General and do not have any option to make up new instructions for ourselves here. But with the potential of a new Attorney General being sworn in as early as tomorrow, it may well be that we would be in a position to return to the status quo ante. We are not looking to have a confrontation with you or the Subcommittee. We have been trying to avoid that.

Senator NUNN. Nor are we. We were not, we have not been, and we are not looking for it now.

Well, with that under advisement, I would——

Senator COHEN. Excuse me, Mr. Chairman. What I understood the Chairman was doing was to simply lay the foundation to say that he was instructing the witnesses to appear consistent with the subpoena, asking Mr. Stanton and Mr. Huneycutt as to whether they intended to comply with that, and then assuming that you would say no under the circumstances, take the matter under advisement.

Senator NUNN. Well, I was also, as Mr. Bolton has detected, laying the foundation for possible contempt proceedings so I guess I was doing both. But I was not—at this stage I have overruled the objections. At this stage I have heard you, Mr. Bolton. I take that under advisement and I will at this stage adjourn the Subcommittee. We will expect to hear back from you when you have a new Attorney General, hopefully tomorrow morning.

We would expect for you to address the questions that we have raised here this afternoon, including conflict of interest as to whether Mr. Stanton and Mr. Huneycutt should have their own attorney, and we would expect a constructive attitude of cooperation. That is all we are asking. We are just trying to get the facts. We are trying to do it in a way that the witnesses have every right to give their side of the story without fear of intimidation or retaliation and that we have no conflict of interest and that the witnesses have the right to their own counsel. That is what we are trying to do.

Mr. BOLTON. Senator, we do not have a dissimilar interest. And let me say also, because this question of intimidation has come up before, I know of absolutely no instance in which any witness, any Department of Justice employee has ever been subject to intimidation in this matter and it would be contrary to the high standards of the career professionals in the Department ever to do that and I can assure you that if I felt there had been anything like that I would have taken action.

I am convinced that the career lawyers who have handled this litigation throughout and who have worked thus far in the Committee's investigation have behaved entirely properly at all times

and I can assure the Committee that they will continue to do so. That is our absolute word.

Senator NUNN. At this stage I think I will leave it where it is. We will hope to get back with you and we hope to be able to complete our investigation.

Senator RUDMAN. Mr. Chairman, I think the record should be very clear at this point in the proceedings. These witnesses happened to be here today under subpoena, that the court findings that I was addressing related to the Justice Department generally, and that I restate my objection to counsel for the Justice Department representing agency employees. I repeat for the benefit of Mr. Stanton and Mr. Huneycutt that I was not in any way implying or suggesting that those charges applied to them. They are general Department charges.

Senator NUNN. The Subcommittee will stand in recess subject to the call of the Chair.

[Whereupon, at 3:40 p.m., the Subcommittee adjourned subject to the call of the Chair.]

APPENDIX

INVESTIGATION OF THE INSLAW CASE

Subpart B—Production or Disclosure in Federal and State Proceedings

SOURCE: Order No. 919-80, 45 FR 83210, Dec. 18, 1980, unless otherwise noted.

§ 16.21 Purpose and scope.

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party; and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a "demand") of a court or other authority is issued for such material or information.

(b) For purposes of this subpart, the term "employee of the Department" includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. attorneys, U.S. marshals, U.S. trustees and members of the staffs of those officials.

(c) Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prospective, or regulatory agencies.

(d) This subpart is intended only to provide guidance for the internal operations of the Department of Justice and is not intended to, and does not and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

§ 16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party.

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the United States Attorney for the district where the issuing authority is located. The responsible United States attorney shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible United States attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand the responsible United States attorney

shall request a summary of the information sought and its relevance to the proceeding.

§ 16.23 General disclosure authority in Federal and State proceedings in which the United States is a party.

(a) Every attorney in the Department of Justice in charge of any case or matter in which the United States is a party is authorized, after consultation with the "originating component" as defined in § 16.24(a) of this part, to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by any attorney, or investigator of the Department of Justice, as such attorney shall deem necessary or desirable to the discharge of the attorney's offical duties: *Provided,* Such an attorney shall consider, with respect to any disclosure, the factors set forth in § 16.26(a) of this part: *And further provided,* An attorney shall not reveal or furnish any material, documents, testimony or information when, in the attorney's judgment, any of the factors specified in § 16.26(b) exists, without the express prior approval by the Assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office for United States Trustees (hereinafter referred to as "the EOUST"), or such persons' designees.

(b) An attorney may seek higher level review at any stage of a proceeding, including prior to the issuance of a court order, when the attorney determines that a factor specified in § 16.26(b) exists or foresees that higher level approval will be required before disclosure of the information or testimony in question. Upon referral of a matter under this subsection, the responsible Assistant Attorney General, the Director of EOUST, or their designees shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party's attorney setting forth a summary of the testimony sought must be furnished to the Department attorney handling the case or matter.

§ 16.24 Procedure in the event of a demand where disclosure is not otherwise authorized.

(a) Whenever a matter is referred under § 16.22 of this part to a United States Attorney or, under § 16.23 of this part, to an Assistant Attorney General, the Director of the EOUST, or their designees (hereinafter collectively referred to as the "responsible official"), the responsible official shall immediately advise the official in charge of the bureau, division, office, or agency of the Department that was responsible for the collection, assembly, or other preparation of the material demanded or that, at the time the person whose testimony was demanded acquired the information in question, employed such person (hereinafter collectively referred to as the "originating component"), or that official's designee. In any instance in which the responsible official is also the official in charge of the originating component, the responsible official may perform all functions and make all determinations that this regulation vests in the originating component.

(b) The responsible official, subject to the terms of paragraph (c) of this section, may authorize the appearance and testimony of a present or former Department employee, or the production of material from Department files if:

(1) There is no objection after inquiry of the originating component;

(2) The demanded disclosure, in the judgment of the responsible official, is appropriate under the factors specified in § 16.26(a) of this part; and

(3) None of the factors specified in § 16.26(b) of this part exists with respect to the demanded disclosure.

(c) It is Department policy that the responsible official shall, following any necessary consultation with the originating component, authorize testimony by a present or former employee of the Department or the production of material from Department files

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without further authorization from Department officials whenever possible: *Provided,* That, when information is collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of the Department or by the EOUST, the Assistant Attorney General in charge of such a division or the Director of the EOUST may require that the originating component obtain the division's or the EOUST's approval before authorizing a responsible official to disclose such information. Prior to authorizing such testimony or production, however, the responsible official shall, through negotiation and, if necessary, appropriate motions, seek to limit the demand to information, the disclosure of which would not be inconsistent with the considerations specified in § 16.26 of this part.

(d)(1) In a case in which the United States is not a party, if the responsible U.S. attorney and the originating component disagree with respect to the appropriateness of demanded testimony or of a particular disclosure, or if they agree that such testimony or such a disclosure should not be made, they shall determine if the demand involves information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department or the EOUST. If so, the U.S. attorney shall notify the Director of the EOUST or the Assistant Attorney General in charge of the division responsible for such litigation or investigation, who may:

(i) Authorize personally or through a Deputy Assistant Attorney General, the demanded testimony or other disclosure of the information if such testimony or other disclosure, in the Assistant or Deputy Assistant Attorney General's judgment or in the judgment of the Director of the EOUST, is consistent with the factors specified in § 16.26(a) of this part, and none of the factors specified in § 16.26(b) of this part exists with respect to the demanded disclosure;

(ii) Authorize, personally or by a designee, the responsible official, through negotiations and, if necessary, appropriate motions, to seek to limit the demand to matters, the disclosure of which, through testimony or documents, considerations specified in § 16.26 of this part, and otherwise to take all appropriate steps to limit the scope or obtain the withdrawal of a demand; or

(iii) If, after all appropriate steps have been taken to limit the scope or obtain the withdrawal of a demand, the Director of the EOUST or the Assistant or Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter, personally or through a Deputy Assistant Attorney General, for final resolution to the Deputy or Associate Attorney General, as indicated in § 16.25 of this part.

(2) If the demand for testimony or other disclosure in such a case does not involve information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department, the originating component shall decide whether disclosure is appropriate, except that, when especially significant issues are raised, the responsible official may refer the matter to the Deputy or Associate Attorney General, as indicated in § 16.25 of this part. If the originating component determines that disclosure would not be appropriate and the responsible official does not refer the matter for higher level review, the responsible official shall take all appropriate steps to limit the scope or obtain the withdrawal of a demand.

(e) In a case in which the United States is a party, the Assistant General or the Director of the EOUST responsible for the case or matter, or such persons' designees, are authorized, after consultation with the originating component, to exercise the authorities specified in § 16.24(d)(1)(i) through (iii) of this part: *Provided,* That if a demand involves information that was collected, assembled, or prepared originally in connection with litigation or an investigation supervised by another unit of the Department, the responsible official shall notify the other division or the EOUST concerning the demand and the anticipated response. If two litigating units of the Department are unable to resolve a disagreement con-

cerning disclosure, the Assistant Attorneys General in charge of the two divisions in disagreement, or the Director of the EOUST and the appropriate Assistant Attorney General, may refer the matter to the Deputy or Associate Attorney General, as indicated in § 16.25(b) of this part.

(f) In any case or matter in which the responsible official and the originating component agree that it would not be appropriate to authorize testimony or otherwise to disclose the information demanded, even if a court were so to require, no Department attorney responding to the demand should make any representation that implies that the Department would, in fact, comply with the demand if directed to do so by a court. After taking all appropriate steps in such cases to limit the scope or obtain the withdrawal of a demand, the responsible official shall refer the matter to the Deputy or Associate Attorney General as indicated in § 16.25 of this part.

(g) In any case or matter in which the Attorney General is personally involved in the claim of privilege, the responsible official may consult with the Attorney General and proceed in accord with the Attorney General's instructions without subsequent review by the Deputy or Associate Attorney General.

§ 16.25 Final action by the Deputy or Associate Attorney General.

(a) Unless otherwise indicated, all matters to be referred under § 16.24 by an Assistant Attorney General, the Director of the EOUST, or such person's designees to the Deputy or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the matter is referred personally by or through the designee of an Assistant Attorney General who is within the general supervision of the Deputy Attorney General, or (2) to the Associate Attorney General, in all other cases.

(b) All other matters to be referred under § 16.24 to the Deputy or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the originating component is within the supervision of the Deputy Attorney General or is an independent agency that, for administrative purposes, is within the Department of Justice, or (2) to the Associate Attorney General, if the originating component is within the supervision of the Associate Attorney General.

(c) Upon referral, the Deputy or Associate Attorney General shall make the final decision and give notice thereof to the responsible official and such other persons as circumstances may warrant.

§ 16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute, such as the income tax laws, 26 U.S.C. 6103 and 7213, or a rule of procedure, such as the grand jury secrecy rule, F.R.Cr.P., Rule 6(e),

(2) Disclosure would violate a specific regulation;

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

(4) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection,

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired,

(6) Disclosure would improperly reveal trade secrets without the owner's consent.

(c) In all cases not involving considerations specified in paragraphs (b)(1) through (b)(6) of this section, the

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Deputy or Associate Attorney General will authorize disclosure unless, in that person's judgment, after considering paragraph (a) of this section, disclosure is unwarranted. The Deputy or Associate Attorney General will not approve disclosure if the circumstances specified in paragraphs (b)(1) through (b)(3) of this section exist. The Deputy or Associate Attorney General will not approve disclosure if any of the conditions in paragraphs (b)(4) through (b)(6) of this section exist, unless the Deputy or Associate Attorney General determines that the administration of justice requires disclosure. In this regard, if disclosure is necessary to pursue a civil or criminal prosecution or affirmative relief, such as an injunction, consideration shall be given to:

(1) The seriousness of the violation or crime involved,

(2) The past history or criminal record of the violator or accused,

(3) The importance of the relief sought,

(4) The importance of the legal issues presented,

(5) Other matters brought to the attention of the Deputy or Associate Attorney General.

(d) Assistant Attorneys General, United States attorneys, the Director of the EOUST, United States trustees, and their designees, are authorized to issue instructions to attorneys and to adopt supervisory practices, consistent with this subpart, in order to help foster consistent application of the foregoing standards and the requirements of this subpart.

§ 16.27 Procedure in the event a department decision concerning a demand is not made prior to the time a response to the demand is required.

If response to a demand is required before the instructions from the appropriate Department official are received, the responsible official or other Department attorney designated for the purpose shall appear and furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been or is being, as the case may be, referred for the prompt consideration of the appropriate Department official and shall respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

§ 16.28 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 16.27 of this chapter pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions rendered in accordance with §§ 16.24 and 16.25 of this part not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall, if so directed by the responsible Department official, respectfully decline to comply with the demand. *See* United States ex rel. Touhy v. Ragen 340 U.S. 462 (1951).

§ 16.29 Delegation by Assistant Attorneys General.

With respect to any function that this subpart permits the designee of an Assistant Attorney General to perform, the Assistant Attorneys General are authorized to delegate their authority, in any case or matter or any category of cases or matters, to subordinate division officials or U.S. attorneys, as appropriate.

APPENDIX TO SUBPART B—REDELEGATION OF AUTHORITY TO THE DEPUTY ASSISTANT ATTORNEY GENERAL FOR LITIGATION, ANTITRUST DIVISION, TO AUTHORIZE PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

1. By virtue of the authority vested in me by 28 CFR 16.23(b)(1) the authority delegated to me by that section to authorize the production of material and disclosure of information described in 28 CFR 16.21(a) is hereby redelegated to the Deputy Assistant Attorney General for Litigation, Antitrust Division.

2. This directive shall become effective on the date of its publication in the FEDERAL REGISTER.

[Amdt. No. 960-81, 46 FR 52356, Oct. 27 1981]

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§ 50.15 Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil and Congressional proceedings, and in state criminal proceedings in which Federal employees are sued or subpoenaed in their individual capacities.

(a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil and Congressional proceedings and in state criminal proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the pleadings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate con-

ditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation is not available in federal criminal proceedings. In other proceedings for which representation is sought, where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(5) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to that for which representation has been requested, then representation may be provided.

(6) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in the related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16 provided no decision has been made to

seek an indictment or file an information against the employee.

(7) In any case where it is determined that Department of Justice attorneys will represent a federal employee, the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed.

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States;

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States;

(iii) Where appropriate, that neither the Department of Justice nor any agency of the United States Government is obligated to pay or to indemnify the defendant employee for any judgment for money damages which may be rendered against such employee;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraphs (a)(6), (a)(9) and (a)(10) of this section, and by § 50.16.

(8) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(9) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(10) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and potential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

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(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.16.

(11) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever:

(1) The representation requested is in connection with a federal criminal proceeding;

(2) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(3) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

[Order No. 970-82, 47 FR 8172, Feb. 25, 1982]

§ 50.16 Representation of Federal employees by private counsel at Federal expense.

(a) Representation by private counsel at federal expense is subject to the availability of funds and may be provided to a federal employee only in the instances described in § 50.15(a)(6), (9) and (10), and in appropriate circumstances, for the purposes set forth in § 50.15(a)(2).

(b) To ensure uniformity in retention procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel under § 50.16, the Civil Division shall be consulted before the retention is undertaken.

(c) Where private counsel is provided, the following procedures shall apply:

(1) While the Department of Justice will generally defer to the employee's choice of counsel, the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken.

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.

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